RHB Investment Bank Bhd & Ors v Plaza Rakyat Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D-22NCC-516 OF 2010
MAH WENG KWAI JC
9 MAY 2011

Contract — Contingent contract — Non-fulfilment of conditions precedent — Defendants signed debt restructuring agreement ('DRA') with plaintiffs — Defendants acknowledged amount owing to plaintiffs in DRA — Pre-conditions in DRA not fulfilled — Plaintiffs treated DRA as lapsed — Whether acknowledgement of debt survived DRA — Whether DRA became void and extinguished acknowledgment of debt — Sections 36(1) and 40 of the Contracts Act 1950 — Whether triable issues existed to defeat summary judgment application

The first defendant entered into a joint venture agreement with the Datuk Bandar Kuala Lumpur ('DBKL') to undertake an urban redevelopment project ('the project'). To finance the project, the first defendant obtained a syndicated term loan of RM200m from the plaintiffs. The lenders were the second to the sixth plaintiffs while the first plaintiff was their security agent. The second defendant guaranteed the payment on demand of all monies owing by the first defendant under the loan. Following the signing of a facility agreement with the plaintiffs, the first defendant made a drawdown of RM50m under the facility but began to default in servicing the interest payments. The plaintiffs notified the first defendant of the principal and arrears of interest due, but did not terminate the facility agreement. To settle its debts, the first defendant entered into a debt restructuring agreement ('DRA') under which, inter alia, it acknowledged owing RM76,026,021 in principal and accrued interest to the plaintiffs. The parties agreed that if any one or more of the pre-conditions the first defendant was supposed to satisfy under the DRA by a certain date was not performed, the DRA shall be terminated. The defendants failed to fulfil the conditions precedent and the plaintiffs deemed the DRA terminated. The first plaintiff wrote to the first defendant confirming the DRA had lapsed. The plaintiffs later filed the instant action claiming RM144,850,434.26 against the defendants and applied for summary judgment for that sum. In the meanwhile, the plaintiffs said they had no objection to DBKL's tender to find and appoint a third party to take over the project from the first defendant in order to complete the project and settle the defendants' debts due to the plaintiffs. The issues before the court were whether: (i) the acknowledgement of the debt under the DRA survived the termination of the DRA (ii) the plaintiffs' failure to expressly terminate the facility agreement and DRA meant both agreements subsisted and, as a result, rendered the summary judgment

application premature (iii) the plaintiffs had waived their rights against the defendants by agreeing to DBKL's appointment of a third party to take over the project from the defendants (iv) the plaintiffs' certificate of indebtedness was correct and conclusive and (v) the plaintiffs' claim was time-barred.

Held, dismissing the application with costs:

(1) The DRA became void under s 36(1) of the Contracts Act 1950 ('the Act'), as the specified conditions precedent did not happen within the fixed time, and the acknowledgment of the debt therein became unenforceable (see para 26).

(2) The plaintiffs, as the promisees under the DRA, chose to put an end to the contract. This, the first plaintiff did by writing to the first defendant confirming that the DRA had lapsed. Hence, the acknowledgment of the debt in the DRA could not be said to be continuing within the meaning of s 40 of the Act (see para 29).

(3) Even if the facility agreement and DRA were still subsisting, the plaintiffs could not single out the acknowledgment of the debt by the defendants for selective enforcement. In any case, the debt acknowledged was only RM76,026,021 and not RM144,850,434.26 as claimed in the O 14 application (see para 32).

(4) Whether or not the plaintiffs had waived or extinguished their rights against the defendants by consenting to the appointment of a third party to take over the project from the first defendant was a triable issue (see para 35).

(5) There were serious and unexplained discrepancies in the amount purportedly owing by the defendants. These could only be resolved through evidence at trial (see para 37).

(6) The plaintiffs issued their letter of demand to the defendants in 1998. It would appear that when they filed their statement of claim in the year 2010, they had filed it beyond the limitation period of six years from the date when the cause of action arose pursuant to s 6(1)(a) of the Limitation Act 1953 (see para 41).

[Bahasa Malaysia summary

Defendan pertama telah memasuki perjanjian usahasama dengan Datuk Bandar Kuala Lumpur ('DBKL') untuk melaksanakan projek pembangunan semula bandar ('projek'). Untuk membiayai projek tersebut, defendan pertama telah memperoleh pinjaman berpenggal sejumlah RM200 juta daripada plaintif-plaintif. Pemberi pinjaman adalah plaintif-plaintif kedua hingga keenam manakala plaintif pertama adalah ejen cagaran mereka. Defendan kedua menjamin bayaran atas tuntutan untuk semua wang yang perlu dibayar oleh defendan pertama di bawah pinjaman tersebut. Berikutan

penandatanganan perjanjian kemudahan dengan plaintif-plaintif, defendan pertama telah membuat surutan RM50 juta di bawah kemudahan tersebut tetapi mula ingkar dalam memberi khidmat bayaran faedah. Plaintif-plaintif telah memberitahu defendan pertama berhubung prinsipal dan faedah terakru yang perlu dibayar, tetapi tidak menamatkan perjanjian kemudahan itu. Untuk menyelesaikan hutangnya, defendan pertama telah memasuki perjanjian penstrukturan semula hutang ('PPSH') di mana di bawahnya, antara lain, ia mengakui berhutang sejumlah RM76,026,021 dalam prinsipal dan faedah terakru kepada plaintif-plaintif. Pihak-pihak bersetuju bahawa jika mana-mana satu atau lebih daripada prasyarat tersebut perlu dipenuhi oleh defendan pertama di bawah PPSH pada tarikh tertentu tidak dilaksanakan, maka PPSH itu hendaklah ditamatkan. Plaintif pertama telah menulis kepada defendan pertama mengesahkan PPSH telah luput. Plaintif-plaintif kemudian telah memfailkan tindakan ini menuntut RM144,850,434.26 terhadap defendan-defendan dan memohon penghakiman terus untuk jumlah tersebut. Sementara itu, plaintif-plaintif menyatakan bahawa mereka tiada bantahan terhadap tender DBKL untuk mencari dan melantik pihak ketiga untuk mengambil alih projek tersebut daripada defendan pertama bagi tujuan menyiapkan projek tersebut dan menyelesaikan hutang defendan-defendan yang perlu dibayar kepada plaintif-plaintif. Isu-isu di hadapan mahkamah adalah sama ada: (i) pengakuan hutang di bawah PPSH dapat bertahan daripada PPSH ditamatkan; (ii) kegagalan plaintif-plaintif untuk secara nyata menamatkan perjanjian kemudahan dan PPSH bermaksud kedua-dua perjanjian masih wujud dan, akibatnya, menyebabkan permohonan penghakiman terus pramatang; (iii) plaintif-plaintif telah mengetepikan hak-hak mereka terhadap defendan-defendan dengan bersetuju dengan lantikan pihak ketiga oleh DBKL untuk mengambil alih projek tersebut daripada defendan-defendan; (iv) sijil keberhutangan plaintif-plaintif adalah wajar dan muktamad; dan (v) tuntutan plaintif-plaintif telah luput had masa.

Diputuskan, menolak permohonan dengan kos:

(1) PPSH menjadi tidak sah di bawah s 36(1) Akta Kontrak 1950 ('Akta tersebut'), kerana syarat duluan yang ditetapkan tidak berlaku dalam masa yang ditetapkan, dan oleh itu pengakuan hutang tersebut tidak boleh dikuatkuasakan (lihat perenggan 26).

(2) Plaintif-plaintif, sebagai penerima janji di bawah PPSH, memilih untuk menamatkan kontrak tersebut. Ini, plaintif pertama telah lakukan secara bertulis kepada defendan pertama dengan mengesahkan bahawa PPSH telah luput. Justeru itu, pengakuan hutang dalam PPSH tidak boleh dikatakan berterusan dalam maksud s 40 Akta tersebut (lihat perenggan 29).

(3) Jika pun perjanjian kemudahan dan PPSH masih wujud, plaintif-plaintif tidak boleh memilih pengakuan hutang oleh defendan-defendan untuk

penguatkuasaan selektif. Dalam apa kes pun, hutang yang diakui hanya berjumlah RM76,026,021 dan bukan RM144,850,434.26 sepertimana dituntut dalam permohonan A 14 (lihat perenggan 32).

(4) Sama ada atau tidak plaintif-plaintif telah mengetepikan atau melepaskan hak-hak mereka terhadap defendan-defendan dengan bersetuju terhadap pelantikan pihak ketiga untuk mengambil alih projek tersebut daripada defendan pertama merupakan isu yang perlu dibicarakan (lihat perenggan 35).

(5) Terdapat pertikaian serius dan tidak boleh dijelaskan dalam jumlah yang dikatakan defendan-defendan berhutang. Ia hanya boleh diselesaikan melalui keterangan dalam perbicaraan (lihat perenggan 37).

(6) Plaintif-plaintif telah mengeluarkan surat tuntutan mereka kepada defendan-defendan pada tahun 1998. Adalah jelas bahawa apabila mereka memfailkan penyataan tuntutan mereka pada tahun 2010, mereka telah memfailkannya melampaui tempoh had masa enam tahun dari tarikh apabila kausa tindakan timbul menurut s 6(1)(a) Akta Had Masa 1953 (lihat perenggan 41).]

Notes

For a case on non-fulfilment of conditions precedent, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3802.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47, PC (refd)
Annie Quah Lay Nah v Syed Jafer Properties & Ors [2007] 1 MLJ 225; [2007] 1 CLJ 1, CA (refd)
Arab Malaysian Bank Bhd v Amalan Tepat Sdn Bhd & Ors [2003] 6 CLJ 306, HC (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)
Bill Keh Lung v Don Xia [2003] 679 HKCU 1 (refd)
Cempaka Finance Bhd v Ho Lai Ying (Trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)
Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24, SC (refd)
Jaafar bin Ibrahim v Gan Kim Kin [1987] 2 MLJ 109, PC (refd)
Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd [2006] 6 MLJ 544, CA (refd)

Legislation referred to

Contracts Act 1950 ss 36(1), 40
Limitation Act 1953 s 6(1)(a)
Rules of the High Court 1980 O 14

SM Yoong (Chan Weili with her) (Shook Lin & Bok) for the plaintiffs.
Peter Skelchy (Cheah Teh & Su) for the defendants.

Mah Weng Kwai J:

[1] The plaintiffs' application to enter summary judgment under O 14 of the Rules of the High Court 1980 against the defendants was dismissed on 1 March 2011 with costs in any event to be determined at the end of the trial. The plaintiffs now appeal against the said decision.

FACTS OF THE CASE

[2] The first defendant entered into a joint venture agreement ('the JVA') dated 16 September 1992 with Datuk Bandar Kuala Lumpur ('DBKL') for the redevelopment of an urban area known as the Plaza Rakyat project ('the project') in Jalan Pudu, Kuala Lumpur.

[3] In order to finance the construction of the project, the first defendant applied for and was granted a facility.

[4] The plaintiffs granted a syndicated term loan of RM200m ('the facility') to the defendants. A syndicated term loan agreement ('the facility agreement') was executed on 27 June 1994. The facility was to be drawn down in 11 transactions from 30 June 1994 to 31 March 1997. As collateral the first defendant charged the leases created over the project land, but not the land itself to the plaintiffs.

[5] The lenders of the facility are the second to the sixth plaintiffs ('the lenders'). The first plaintiff was appointed the agent and security agent of the lenders.

[6] The second defendant guaranteed the payment on demand of all monies including interest due and owing by the first defendant to the first plaintiff as the security agent for the second to the sixth plaintiffs.

[7] The first defendant made one draw down of the facility of RM50m. The first defendant was not permitted to make subsequent drawdowns.

[8] The plaintiffs by letter dated 3 April 1998 pursuant to cl 15.2 of the facility agreement gave notice to the first defendant that the sum of RM50m together with RM1,921,575.35, RM50,000 and RM19,353.58 (totalling RM1,990,928.93) being interest accruing, had become due, and payable.

[9] The plaintiffs however did not terminate the facility agreement and their obligations under cl 15.2(a) of the facility agreement. A

[10] To facilitate a settlement of the amounts due to the plaintiffs and other financiers and creditors, the defendants entered into a debt restructuring agreement (DRA) dated 15 October 2004 with the plaintiffs and other creditors. B

[11] The DRA provided, inter alia, for the following: C

(a) that the principal sum owing to the plaintiffs as at 31 December 2001 was acknowledged at RM50m;

(b) that the accrued interest as at 31 December 2001 was acknowledged at RM26,026,021;

(c) that the secured financing debt as at 31 December 2001 was acknowledged as RM76,026,021; D

(d) that the second defendant was, as one of the preconditions to settle the balance of the secured financing debt due to the plaintiffs by the issuance of irredeemable convertible unsecured loan stocks ('ICULS'), warrants and new shares upon the conversion of the ICULS; E

(e) that the cut-off date for the satisfaction of the conditions precedent was 31 December 2004; and

(f) that it was agreed in the event any one or more of the conditions precedent was/were not satisfied by the cut-off date, the plaintiffs and other creditors would be discharged from all obligations to the defendants and the DRA shall be terminated. F

[12] The defendants did not satisfy the conditions precedent by 31 December 2004 and the DRA was *deemed terminated* by the plaintiffs. G

[13] On 30 March 2006 the first plaintiff wrote to the first defendant confirming that the DRA had *lapsed*. H

[14] The plaintiffs on 5 February 2010 requested the first defendant to forward an acknowledgment of debt in the sum of RM89,445,360.90 as at 31 October 2009 within seven days from the date of the letter to the plaintiffs. I

[15] On 9 February 2010, DBKL invoked section 9.03 of the JVA and served a notice on the plaintiffs requiring them to nominate a third party within 60 days from the date of receipt of the notice to substitute the first defendant in the JVA as part of its enforcement of its security.

[16] On 25 February 2010 the plaintiffs issued a letter of demand to the defendants to pay all sums outstanding (see encl 4-exh RHB7).

[17] On 4 March 2010 a meeting was held between the plaintiffs and DBKL where DBKL proposed to waive their rights under section 9.03 of the JVA and to call for a tender to find a suitable party to revive and complete the project. DBKL assured the plaintiffs that the third party would be required to assume all liabilities arising from the project including sums owing by the defendants to the plaintiffs.

[18] On 18 March 2010 the plaintiffs filed the writ of summons and statement of claim against the defendants for the total sum of RM144,850,434.26 as at 31 January 2010, together with interest and costs.

[19] The plaintiffs by letter dated 29 March 2010 informed DBKL that they had no objections to the tender to appoint a third party to take over the project.

[20] The plaintiffs filed the summons in chambers (encl 3) on 18 June 2010 for summary judgment of the said sum together with interest and costs to be entered against the defendants.

DECISION OF THE COURT

[21] On 1 March 2011, after reading the cause papers and written submissions and upon hearing the oral submissions of counsel for both the plaintiffs and defendants, the court dismissed the application with costs in any event to the defendants to be determined at the end of the trial. The defendants were ordered to file their defence within 14 days of the order.

REASONS FOR THE DECISION

[22] The following issues were considered by the court and were found to be triable issues.

The first issue — whether the defendants have acknowledged their debt under the DRA and are estopped from denying their liability

[23] It was the plaintiffs' case that the defendants have acknowledged their debt to the plaintiffs pursuant to the DRA (see encl 4 — the plaintiffs' affidavit in support — exh RHB6 — at pp 375 and 410) wherein the defendants have admitted owing the principal sum of RM50m and interest of RM26,026,021 as at 31 Decemebr 2001 to the plaintiffs and that the defendants are estopped from denying liability of the same.

[24] It was not disputed by the parties that the DRA is a conditional agreement subject to the performance of the conditions precedent by the first defendant on or before the cut-off date of 31 December 2004. It was also not disputed by the parties that the first defendant did not manage to fulfill the conditions precedent by the cut-off date and that the first plaintiff had written to the first defendant on 30 March 2006 stating that the DRA had lapsed.

[25] One of the main issues to be determined by the court was whether the plaintiffs, holding that the DRA had lapsed and therefore terminated, can proceed in their claim against the defendants on the basis that the acknowledgement of the debt survives the termination of the DRA.

[26] I am afraid not. This is in view of the provisions of s 36(1) of the Contracts Act 1950 (CA) which provides:

> 36(1) Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time *become void* if, at the expiration of the time fixed, the event has not happened, or if before the time fixed, the event becomes impossible.

In the present case, the specified conditions precedent did not happen within the fixed time. In the case of *Jaafar bin Ibrahim v Gan Kim Kin* [1985] 2 MLJ 24, the Supreme Court held that when a specified event does not happen by a deadline, the contract becomes void under s 36(1) of the CA. Jaafar bin Ibrahim was later affirmed by the Privy Council (see *Jaafar bin Ibrahim v Gan Kim Kin* [1987] 2 MLJ 109). Consequently, this meant that the DRA became void and the acknowledgment of the debt therein would be unenforceable.

[27] The case of *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47, cited by counsel for the plaintiffs, suggests that where a conditional agreement is not affirmed it would mean that no agreement exists between the parties. By extension, the court is of the view that this would also mean that no acknowledgement of the debt exists between the parties.
The court is of the considered view that as the DRA had become void, the plaintiffs cannot elect to treat the acknowledgment of the debt contained therein as still subsisting.

[28] Further s 40 of the CA provides:

> 40 When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, *the promisee may put on end to the contract,* unless he has signified, by words or conduct, his acquiescence in its continuance.

From the facts of this case, it is clear that the plaintiffs as the promisees in the DRA, had chosen to put an end to the contract. This the first plaintiff did by writing to the first defendant on 30 March 2006 confirming that the DRA had lapsed.

[29] Gopal Sri Ram JCA (as he then was) in the Court of Appeal case of *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd* [2006] 6 MLJ 544 held that 'it follows that a party to a contract who affirms in its continued performance must himself perform his obligations'. The learned judge cited with approval the cases of *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 per Seah FJ and *Bill Keh Lung v Don Xia* [2003] 679 HKCU 1 per Ma JA of the Court of Appeal of Hong Kong. However, in the present case the plaintiffs did not affirm the continued performance of the DRA. The plaintiffs did not by words or conduct acquiesce in its continuance. In fact the plaintiffs treated the DRA as having lapsed. Hence, the acknowledgment of the debt in cl 10.1 and Schedule 3 of the DRA cannot be said to be continuing within the meaning of s 40 of the CA. Without the DRA, the triable issue before the court will then be the determination of the rights and obligations of the plaintiffs and defendants under the facility agreement.

[30] The defendants contended that the plaintiffs have failed to terminate the facility agreement by notice to the first defendant pursuant to cl 15.2 of the facility agreement. And that despite the letter of demand dated 3 April 1998, there was no effective termination of the facility agreement by the plaintiffs. The defendants also contended that although the conditions precedent were not met by the second defendant under the DRA by the cut-off date of 31 December 2004, the plaintiffs had failed to expressly terminate the DRA.

[31] Going on the premise that the DRA is still subsisting, this would mean the rights and obligations of the plaintiffs and defendants under the DRA are still valid and binding and that the terms pertaining to the full and final settlement of the balance of the secured financing debt are still subsisting, in which event the application for summary judgment will be premature.

[32] In any event, it is the finding of the court also that if the facility agreement and DRA are still subsisting, the plaintiffs cannot be seen to 'single' out the acknowledgment of the debt by the defendants for selective enforcement. The plaintiffs themselves must be seen to continue with the performance of their obligations under the agreements. Further, while the defendants have conceded that there was an acknowledgment of debt, it was in respect of the sum of RM76,026,021 only and not for the sum of RM144,850,434.26 as claimed in the O 14 application, which sum is almost twice the alleged acknowledged amount.

The second issue — whether the plaintiffs have waived their rights against the defendants

[33] When DBKL was looking for a suitable third party to take over the project from the defendants, to revive and complete it, DBKL on 9 February

2010 served a notice on the plaintiffs requiring them to nominate a third party to substitute the first defendant in the JVA within 60 days from the date of receipt of the notice. And on 29 March 2010 the plaintiffs informed DBKL that they had no objection to the tender to appoint a suitable third party to replace the first defendant.

[34] By consenting to the appointment of a third party by DBKL, it would appear that the plaintiffs have elected to allow a third party to assume the liabilities of the first defendant and to settle the sums purportedly owing by the first defendant to the plaintiffs. The plaintiffs however contended that their meeting with DBKL was out of concern over the termination of the leases and in any event the substitution of a third party does not amount to a waiver.

[35] The terms of the plaintiffs' agreement with DBKL will have to be considered in full at the trial. In the case of *Annie Quah Lay Nah v Syed Jafer Properties & Ors* [2007] 1 MLJ 225; [2007] 1 CLJ 1 (CA), Gopal Sri Ram JCA (as he then was) on the doctrine of estoppel, said:

> ... the doctrine is essentially equitable in nature. It is a rule by which justice is done according to the facts and circumstances of a particular case and its operation depends much upon the conduct of the parties. It is therefore extremely flexible in its application because it moulds itself to fit a particular fact pattern. Accordingly, categories of cases to which the doctrine applies are not closed.
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> In the context of litigation, it usually arises where a party to an action has at least two alternative and mutually exclusive courses open to him. If by words or conduct he elects to pursue one of them and thereby leads his opponent to believe that he has abandoned the other, he may, if the circumstances so warrant, be precluded from later changing course. Decisions upon the application of the doctrine to litigation are but mere illustrations of the broader proposition. Indeed, this is true of all cases where the doctrine has been applied to other spheres of human activity.

It is a finding of the court that whether the plaintiffs have waived or extinguished their rights and thereby estopped against the defendants is a triable issue.

The third issue — whether the plaintiffs' certificate of indebtedness is correct and conclusive

[36] The plaintiffs submitted that the certificate of indebtedness and statement of accounts (encl 6 — exh RHB18) are correct, conclusive and binding on the defendants (see *Cempaka Finance Bhd v Ho Lai Ying (Trading as KH Trading) & Anor* [2006] 2 MLJ 685).

[37] However, the court finds itself in agreement with counsel for the defendants in that there are serious and unexplained discrepancies in the

amount purportedly owing by the defendants to the plaintiffs. The plaintiffs' claim stands at RM144,850,434.26 as at 31 January 2010 whereas the plaintiffs in their letter to the first defendant dated 5 February 2010 had requested the first defendant to acknowledge a debt of RM89,445,360.90. The plaintiffs by way of an explanation for the difference merely said that they had made 'an error' in their letter of 5 February 2010 without explaining more. The plaintiffs have exhibited a summary of outstanding sums due as at 31 December 2009 and 31 January 2010 and a statement of accounts showing a breakdown of the sums due as at 31 January 2005. However, it is noted that the plaintiffs have not explained nor accounted satisfactorily for the variation of interest rate chargeable from 6.08%pa to 17.5%pa. It is not clear whether the defendants have been notified of the change of interest rates as provided for in the facility agreement. Where there are apparent discrepancies in the rates of interest and hence the amounts claimed by the plaintiffs in an O 14 application, the discrepancies can only be resolved through evidence at trial. This was so held by Low Hop Bing J (now JCA) in the case of *Arab Malaysian Bank Bhd v Amalan Tepat Sdn Bhd & Ors* [2003] 6 CLJ 306 where His Lordship held that 'such discrepancies can only be resolved by way of mature consideration pursuant to viva voice evidence subject to cross-examination and re-examination and obviously not by way of summary judgment procedure under O 14'.

[38] On the conclusiveness of a certificate of indebtedness, the court is mindful of the decision of Steve Shim CJ (Sabah and Sarawak) in the case of *Cempaka Finance Bhd* where His Lordship held that 'a certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claimed'. In view of the serious and unexplained discrepancies described above, the court finds that the defendants have discharged their burden and have prima facie disproved the amount claimed. The defendants have satisfied the court as to why judgment should not be entered against them. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 (SC) it was held that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

The fourth issue — whether the plaintiffs' claim is time barred

[39] The effect of the deemed termination of the DRA, if indeed it has been terminated or lapsed, or become void under s 36(1) of the CA, is that the rights and obligations of the parties will revert to the position under the facility agreement dated 27 June 1994. There does not seem to be any saving provisions under the DRA in respect of the acknowledgment of the debt contained therein.

[40] With the apparent reversion of the parties' rights and obligations to the facility agreement dated 27 June 1994, any claim by the plaintiffs must necessarily arise from the facility agreement itself, in which case time would not start to run, for purposes of the Limitation Act 1953, from 15 October 2004, the date of the DRA and the acknowledgment of the debt.

[41] The plaintiffs issued their letter of demand dated 3 April 1998 (see encl 6 — the plaintiffs affidavit in reply dated 30 July 2010 — exh RHB12) to the defendants claiming for the principal sum of RM50m together with interest in the sum of RM1,990,928.82 as at 2 March 1998. It would thus appear that when the plaintiffs filed their statement of claim on 18 March 2010, they had filed it beyond the limitation period of six years from the date when the cause of action arose, that is, 3 April 1998, pursuant to s 6(1)(a) of the Limitation Act 1953.

[42] For the reasons enumerated above, the court was of the view that there are issues to be tried in this case.

Application dismissed with costs.

Reported by Ashok Kumar